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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 209

CONTINENTAL TRADING, INC.,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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To The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Continental Trading, Inc., prays that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this Federal income tax case on March 10, 1959. Petition for Rehearing was filed timely on April 7, 1959 by petitioner and was denied on April 16, 1959.

Opinions Below

The Tax Court of the United States filed its Memorandum Findings of Fact and Opinion on August 30, 1957. They are reported as T. C. Memo 1957-164 in Docket No. 55212 and are printed as Appendix B, *infra*, p. 27. The Opinion of the United States Court of Appeals for the Ninth Circuit was filed on March 10, 1959. It has not yet been printed in the official reports but is printed here as Appendix C, *infra*, p. 37.

Jurisdiction

The Opinion and Judgment of the United States Court of Appeals for the Ninth Circuit both were filed on March 10, 1959. They appear, respectively, as Appendix C, *infra*, p. 37, and Appendix D, *infra*, p. 48. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

Question Presented[1]

Whether petitioner, a foreign corporation, "was engaged in trade or business in the United States" during the taxable years 1948, 1949 and 1950, within the meaning of Section 231(b) of the Internal Revenue Code of 1939 so as to be taxable as a resident foreign corporation?

Statute Involved

The applicable portion of the pertinent statute is set forth in Appendix A, *infra*, p. 23.

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[1] This is the same question presented to the Circuit Court of Appeals for the Ninth Circuit below with respect to which it ruled adversely to the petitioner. Should petitioner prevail here, it would be entitled to certain dividends received credits in the taxable years as well as certain deductions claimed for interest, expenses and a loss which are still in controversy and dependent upon the outcome here.

Statement

Petitioner is a Panamanian corporation. It was organized in May, 1947, and maintained its principal office in Mexico City. For the year 1948 it filed an income tax return in California, and for the years 1949 and 1950 it filed such returns in Nevada.

Petitioner qualified as a foreign corporation in Nevada in March, 1948, and continued to be so qualified until March, 1951. It used for its American address that of a Reno, Nevada, company that acted as resident agent for petitioner and other foreign corporations. Petitioner represented that it maintained only one place of business in the United States.

Grover Turnbow, a United States citizen with offices in Oakland, California, served as petitioner's president. After March, 1948, at the suggestion of the California attorney who served as petitioner's vice-president, Turnbow had petitioner's name added to the business names already appearing on his Oakland office and door and on the building directory, which were: International Dairy Association, Inc., International Dairy Engineering Co., and International Dairy Supply Company, hereafter referred to as Association, Engineering, and Supply, respectively. Turnbow was president and sole stockholder of Supply. Petitioner never used the Oakland office on its letterheads or otherwise and paid no rent for the Oakland office.

Petitioner represented the incorporation of part of the vast holdings of Axel Wenner-Gren, an internationally famous financier whose wealth was over $1,000,000,000.[*] Wenner-Gren held substantial amounts of stock in the Elec-

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[*] This sentence was originally found by the Tax Court and was later adopted by the Circuit Court below. It has been objected to consistently by the petitioner as of doubtful propriety. It is irrelevant, prejudicial, and is based upon admitted hearsay testimony. It is also ambiguous; the record does not identify the stockholders of petitioner.

trolux and Servel corporations, as well as sizable and diverse holdings in Mexican and other foreign enterprises. Prior to petitioner's incorporation, Turnbow served as attorney in fact in the United States for Wenner-Gren, who was then borrowing large sums from American lending institutions for use outside the United States.

Turnbow became acquainted with Wenner-Gren in Mexico when he erected a recombined milk plant in which Wenner-Gren had a financial interest. Turnbow unsuccessfully sought to interest Wenner-Gren in financing the supplying of milk by Supply to the armed forces in the Far East.

Turnbow[3] and his various enterprises were interested in erecting recombined milk plants in foreign countries. Prior to and during the years here involved, the program failed to materialize because of the inability to reconvert foreign currency into American dollars, and the instability of foreign currencies.

Turnbow hoped that petitioner would assist in the financing of these plants, if his program[3] for the establishment of recombined milk plants in foreign countries proved feasible. Its function would be to secure funds, but without any voice or activity in the operations of the plants. Petitioner never undertook any activity in connection with the establishment of such recombined milk plants and never used its assets and borrowings for this or any related purpose.

After petitioner's incorporation, it assumed Wenner-Gren's liabilities to various banks, having acquired his stock in the Electrolux and Servel corporations, which it thereupon pledged as security for loans. As of the beginning of

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[3] Petitioner has consistently challenged the accuracy of this statement with respect to *Turnbow's* program. It was the petitioner which was primarily interested in erecting recombined milk plants in foreign countries, as the record indicates.

1948, petitioner had assumed indebtedness of Wenner-Gren as follows:

Bank of America, N.T. & S.A., $1,100,000;
Central Hanover Bank and Trust Company, New York, $480,000;
Telerie, Inc., $926,000.

Petitioner liquidated the loan from Central Hanover Bank during 1848. The loan from Telerie, Inc. remained outstanding as of the end of 1950. It liquidated the loan from the Bank of America in August 1948.

From 1948 through 1950, petitioner had no paid employees in the United States. Turnbow received $1,500 per month during the last 6 months of 1950 denominated as salary for his services to petitioner. This represented part of an overall settlement effectuated in June 1950 between Turnbow and Wenner-Gren, as individuals, whereby Turnbow would receive from Wenner-Gren stock and cash totaling $105,000. The settlement covered, among other items, Turnbow's services to Wenner-Gren from October 1946 through June 1950.

Petitioner maintained no books of account in the United States. Its only records consisted of bank statements, check books, and documents pertaining to transactions within the United States, all in the care of Turnbow's secretary at Oakland. Petitioner maintained bank accounts in the United States at the First National Bank, Reno, Nevada, and at the Bank of America, N.T.&S.A. in San Francisco.

Petitioner's only assets in the United States at the end of 1948 consisted of Electrolux and Servel stock and the two bank account balances.

Petitioner reported on its tax returns for the years in question that it derived more than 50 per cent of its gross income from sources outside the United States. It reported

gross income from sources within the United States, as follows:

1948	$817,791.39
1949	605,635.10
1950	446,863.19

Of the 1948 gross income, $823,635.50 represented dividends on Electrolux and Servel stock. The difference was represented by a reported net loss of $5,844.11 resulting from sales of property other than capital assets. Of the 1949 gross income $602,125.20 represented dividends and $3,509.90 "Other Income in the United States." Of the 1950 gross income, $441,624 represented dividends from the Electrolux Corporation, and $4,239.19 additional income "From Sales."

During 1948, petitioner's activities in the United States included the following: (a) It collected dividends on Electrolux and Servel stock. (b) It made payments of principal and interest on outstanding loans. (c) In May it borrowed $1,000,000 from the Bank of America, which Wenner-Gren used in acquisition of Mexican telephone companies. (d) On August 6, it borrowed $1,850,000 from the Bank of America, of which it used $1,100,000 to repay prior indebtedness of Wenner-Gren to the bank, which petitioner had assumed. On that same date, petitioner drew checks in excess of the balance of $750,000 to make payments of principal and interest on other outstanding indebtedness.

During 1949, petitioner's activities in the United States included the following: (a) It collected dividends on Electrolux and Servel stock. (b) It made payments on principal and interest on outstanding loans. (c) It secured and repaid short-term advances from Turnbow. (d) In September it borrowed $1,700,000 from the Bank of America, used to liquidate the outstanding balances of two loans

from that bank. (c) In December it sold its 55,000 shares of Servel stock, theretofore pledged with the Bank of America to secure loans. It used the proceeds of the sale to pay outstanding obligations to the bank.

During 1950, petitioner's activities in the United States included the following: (a) It collected dividends on Electrolux stock. (b) It made payments on principal and interest on outstanding loans. (c) On January 3, it borrowed $2,000,000 from the Central Hanover Bank. It used the bulk of this loan to repay the $1,700,000 loan from the Bank of America. It transferred approximately $400,000 to its account in Mexico City, $110,000 for the account of a Swedish bank, and approximately $275,000 to its account at the Bank of America, much of which was thereafter transferred to petitioner's Mexican accounts. (d) Petitioner repaid the $2,000,000 loan. In its negotiations with the Central Hanover Bank, petitioner represented itself as a Panamanian corporation, doing business in foreign countries.

The funds borrowed by petitioner were in the main used by Wenner-Gren. Turnbow had no direct knowledge of their use.[4]

In July, 1948, petitioner purchased a carload of dry milk fat from Kraft Foods Company for $46,212.75 and sold it one month later through one of Turnbow's companies for $40,248.[5] As an accommodation to a Mexican corporation, petitioner purchased, in 1950, equipment for that corporation for which it was reimbursed without profit.

In each year, the only other activity reported by petitioner was represented by nominal amounts of income re-

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[4] These two sentences are completely gratuitous and uncorroborated in the record. They are also irrelevant and based upon hearsay testimony.

[5] The record indicates that the difference in price was due to a decline in the market although this was not found by the Tax Court or the Court below.

sulting from transactions relating to cans for milk products used by Supply. In 1948, such reported income amounted to $120.64; in 1949, $3,509.90; in 1950, $5,239.19. The first such can purchase occurred in December, 1948. Turnbow, or Supply put in the order, but in petitioner's name. It paid for the cans and then sold the cans to Supply for a five percent increase over the price it paid. This December 1948 transaction was repeated 37 times in 1949 and on 48 occasions in 1950. Petitioner never used its Nevada office in these operations. It carried no inventory of cans and ordered no cans other than those used by Supply.[6] In every instance in which Supply acquired cans in this way, it paid petitioner within 10 days of petitioner's payment to Western. After 1950, Supply recommended ordering and purchasing of cans directly from Western.

The Commissioner determined deficiencies in the income tax of petitioner for each of the three years. The returns had been filed upon the assumption and with the claim that petitioner was a resident foreign corporation engaged in trade or business in the United States. The Commissioner determined, however, that it was a foreign corporation not engaged in trade or business within the United States and hence subject to a higher income tax liability.

The taxpayer filed its petition in the Tax Court for redetermination of the deficiencies so asserted by the Commissioner. It presented to that court the sole question as to whether petitioner was a resident foreign corpora-

[6] Each of these so-called "can transactions" involved a freight carload of tin cans. Although it was stipulated by the parties in the Tax Court, neither that Court nor the Appellate Court found that three freight carloads of tin cans were purchased by petitioner and resold to a company called Farmers Co-op Creamery. One of these sales occurred in 1949 and two occurred in 1950. The statement that petitioner ordered no cans other than those used by Supply is, therefore, wrong.

tion engaged in trade or business in the United States during those taxable years. The Tax Court sustained the Commissioner's determination of deficiency.

On appeal, the Ninth Circuit below affirmed the Tax Court.

Reasons for Granting the Writ

A. The Opinion of the United States Court of Appeals for the Ninth Circuit below is in conflict with the principles expressed by this Court in *Edwards* v. *Chile Copper Co.* (1926) 270 U. S. 452.

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[1] In connection with the Tax Court proceedings below (and prior to the filing of a Petition for Review by the Circuit Court), petitioner attempted to reopen the record and introduce additional testimony relating to at least eight other and different activities carried on by the petitioner in the United States during the taxable years, asserting its right to do so under Rule 60 of the Rules of Civil Procedure. The Tax Court denied petitioner's motion for this purpose, that refusal was another ground for the appeal, and the Court below also affirmed on this point.

To be distinguished from the activities referred to in the foregoing paragraph are those indicated in the joint stipulation of facts filed in the Tax Court proceeding and taken from the uncontroverted testimony there which establish the following material and relevant facts which were not found either by the Tax Court or the Appeals Court below:

During the taxable years petitioner maintained a *de facto* business office in Oakland, California, which was located in the office of its president, Grover Turnbow. In that office both Turnbow and his secretary devoted a considerable amount of time and activity to the interests and activities of petitioner. In connection with these activities, various miscellaneous office expenses were incurred for postage, insurance, telephone, telegraph, legal, printing, photostating and travel. Two of petitioner's officers resided in California. One of these, petitioner's president Turnbow, negotiated seven bank loans aggregating $6,800,000 during the taxable years; he also negotiated the sale of 55,000 shares of Servel stock. The same officer drew 179 checks against one bank account aggregating $2,209,036.52, drew 20 checks against another bank account aggregating $2,065,987.97, paid miscellaneous office expenses for purposes indicated above, received cash dividends on stock owned by petitioner aggregating $1,867,385.00, repaid various loans of petitioner, and made payments of interest thereon and negotiated in his California office and abroad in connection with the petitioner's program to establish foreign reconditioned milk plants.

A fortiori, these indicate corporate activity in the United States.

B. The holding of the Court below conflicts in principle with the holding of another Circuit Court of Appeals on a similar question.

C. The Court below has in this case decided an important question of Federal law which has not been, but should be, settled by this Court.

A. *The Opinion of the United States Court of Appeals for the Ninth Circuit below is in conflict with the principles expressed by this Court in Edwards v. Chile Copper Co. (1926) U. S. 452.*

The petitioner has urged persistently[8] upon the Ninth Circuit the pertinency of this Court's holding in *Edwards v. Chile Copper Co., supra.* The Circuit Court has, with equal persistence, refused even to consider the case as demonstrated by its *sub silencio* treatment. Not only has the Court below not referred in any way to this case but, most important, it has avoided[9] the application to the petitioner of the principle of integration of activities enunciated in that case. That principle, petitioner believes, is clearly applicable in a situation such as the present one. The holding of the Court below is, therefore, irreconcilable with and inconsistent with the prior opinion of this Court in the *Chile Copper Co.* case. This should warrant the granting of *certiorari. Funk v. United States* (1933) 290 U. S. 371; *Wolfle v. United States* (1934) 291 U. S. 7.

Here is the question: Was petitioner, a foreign corporation, "engaged in trade or business within the United States", within the meaning of Section 231(b) of the Inter

[8] The petitioner's briefs, both opening and reply, filed in the Ninth Circuit urged the controlling precedence of the *Chile Copper Co.* case. In addition, the Petition for Rehearing was limited to this precise question.

[9] As will be set forth below, the Opinion of the Circuit Court first fragments petitioner's activities and then rejects each fragment as insufficient. It does not judge petitioner's activities and situation as a whole.

nal Revenue Code of 1939? If it was, petitioner was a "resident" and taxable on its United States net income like United States corporations. If not, petitioner was a "nonresident" and taxable on its gross income from United States sources. Sec. 231(a).

So far as petitioner can ascertain, the precise language in question has never been construed by any other Circuit Court of Appeals[10] or by this Court[11]. In this narrow sense, the case below is one of first impression at the appellate

[10] Prior to the Revenue Act of 1942, Section 231(b) of the Code contained two alternative tests for "residence"; one required having an "office or place of business within the United States" and the other required being "engaged in trade or business within the United States." Cases were litigated, and some reached the higher courts, with respect to the "office or place of business" test. Cases illustrating this are: *Helvering v. Scottish American Investment Co., Ltd.* (CCA-4, 1943) 139 F. (2d) 419, aff'd 323 U. S. 119 and affirming 47 B.T.A. 474; *Linen Thread Co. v. Comm.* (CCA-2, 1942) 128 F. (2d) 166. Strangely enough, the alternative test (prior to the Revenue Act of 1942) relating to being "engaged in trade or business" and that same test as the sole requirement after the enactment of the Revenue Act of 1942, have never been litigated above the Tax Court of the United States before the present case.

On the other hand, there have been a number of cases reach the appellate courts involving the somewhat similar question of whether foreign *individuals* were engaged in trade or business in the United States under Section 211 of the Internal Revenue Code of 1939 or similar provisions of the later code. Cases in this category include: *Adda v. Commissioner* (CCA-4, 1948) 171 F. (2d) 457; *Balanovski et al. v. U. S.* (CCA-2, 1956) 236 F. (2d) 298; cert. den. 352 U. S. 968; *Comm. v. Nubar* (CCA-4, 1950) 185 F. (2d) 854. There has also been some litigation involving the question of a foreign corporation engaging in trade or business in the United States for purposes of a former federal capital stock tax. See, for example, *Union Internationale de Placements v. Hoey* (CCA-2, 1938) 96 F. (2d) 591.

[11] This Court has ruled in a situation involving the "office or place of business" test formerly in Section 231(b). See *Scottish-American Investment Co., Ltd. v. Commissioner* (1944) 323 U. S. 119. More important, it has ruled on "doing business" or "engaged in business" in a series of older cases involving the capital stock tax. See *McCoach v. Minehill & Schuylkill Haven Railroad Co.* (1912) 228 U. S. 295; *Von Baumbach v. Sargent Land Co.* (1917) 242 U. S. 503 and *Edwards v. Chile Copper Co.*, *supra*.

level. For this reason alone, the case has a significance beyond its own limits.

But this is not to suggest that there are no controlling precedents. The *Chile Copper Co.* case, *supra*, involved a question of whether a domestic corporation was "carrying on or doing business" under a capital stock tax law. The difference in semantics between "carrying on business", "doing business", and "engaged in trade or business" is not significant and, in fact, all three have been held to be synonymous. See G. C. M. 17044, XV-2 Cum. Bull. 317.

The Commissioner of Internal Revenue has promulgated his viewpoint that the definition of what constitutes "carrying on or doing business" applies more broadly than only in a capital stock tax situation. G. C. M. 17044, cited above, concludes that if a corporation was "engaged in trade or business" for income tax purposes it was also "doing business" for capital stock tax purposes. The Commissioner there ruled that "the test for liability for income tax, excess profits tax, and the capital stock tax, insofar as such taxes were based upon, or measured by, engaging in or doing business within the United States, should be identical." The G. C. M. then cites as the leading cases in this area *Lewellyn* v. *Pittsburgh B. & L. E. R. Co.*, (CCA-3, 1915) 222 F. 177; *McCoach* v. *Minehill & Schuylkill Haven Railroad Co.*, *supra*; *Von Baumbach* v. *Sargent Land Co.*, *supra* and *Edwards* v. *Chile Copper Co.*, *supra*. The meanings of these phrases being the same, the principle involved in the *Chile Copper Co.* case becomes equally applicable in the present situation.

Speaking through Mr. Justice Holmes, this Court held in *Edwards* v. *Chile Copper Co.*, *supra*, that the Chile Copper Co. was "doing business" and enunciated the rule of integration of activities in the following language:

"If the corporation was one that Congress had power to tax in this way, it is hard to say that it is not within the taxing acts. *It was organized for profit and was doing what it principally was organized to do in order to realize profit.* The cases must be exceptional, when such activities of such corporations do not amount to doing business in the sense of the statutes. The exemption 'when not engaged in business' ordinarily would seem pretty nearly equivalent to when not pursuing the ends for which the corporation was organized, in the cases where the end is profit. In our opinion the plaintiff was liable to the tax. We do not rest our conclusion upon the issue of bonds in the first year or the call loans made in the last, *and for the same reasons we cannot let the fagot be destroyed by taking up each item of conduct separately and breaking the stick. The activities and situation must be judged as a whole.* Looking at them as a whole we see that the plaintiff was a good deal more than a mere conduit for the Chile Exploration Company. It was its brains or at least the efferent nerve without which that company could not move. The plaintiff owned and by indirection governed it, and was its continuing support, by advances, from time to time in the plaintiff's discretion. There was some suggestion that there was only one business and therefore ought to be only one tax. But if the one business could not be carried on without two corporations taking part in it, each must pay, by the plain words of the Act." (Emphasis supplied)

This requirement that a taxpayer's activities and situation must be judged in their *entirety* should have been applied but was not applied by the Circuit Court below. Fail-

ure to apply this rule is not only an error of law[12], which should be remedied but, more important, it may well presage a new line of precedents which would be in conflict with the principle of this Court's earlier holding unless the defection be corrected at this time.

The failure of the Ninth Circuit to cite and follow the principle of the *Chile Copper Co.* case as to the present petitioner is difficult to reconcile with its frequent reliance upon that case and principle in other related tax matters. It has cited the *Chile Copper Co.* principle in a number of opinions, among which may be mentioned *Section Seven Corporation* v. *Anglim*, *supra*, *U. S.* v. *Western Shore Lumber Co.* (CCA-9, 1943) 136 F. (2d) 628; *Barker Bros. Corp.* v. *Rogan* (CCA-9, 1942) 126 F. (2d) 917 and *U. S.* v. *Hercules Mining Co.* (CCA-9, 1941) 119 F. (2d) 288. The latter case[13] in particular contains an almost classic statement of the principle of taking an entire view of all corporate activities. It says:

> "We do not rest our decision upon any particular activities of the corporation. Perhaps each might be examined separately and separately discarded as not of a character so substantial as to be considered business. But taxpayer's situation and activities must be judged in their entirety."

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[12] For example, in *Section Seven Corp.* v. *Anglim* (CCA-9, 1943) 136 F. (2d) 155, the Court below held that "no special volume of business is necessary to bring it [a corporation] within the taxing act; a very slight activity may be deemed sufficient to constitute 'doing business', citing *Chile Copper*. The same rule applied here would have required a reversal of the Tax Court's decision below.

[13] The case has still another significance for purposes of the present discussion. It involved "other transactions or activities of a noncontinuous nature." These do not appear to be conceptually different from the so-called "casual or incidental transactions" of the present case. Nevertheless, they were included in the overall view which the Ninth Circuit Court of Appeals took in the *Hercules Mining Co.* case but refused in the present case.

If it be said that the cases decided by the Ninth Circuit, referred to above, involved only capital stock tax situations, just as in the case of the *Chile Copper Co.* itself, then the answer is that the principle of the *Chile Copper Co.* case has become a precedent transcending the narrow confines of a capital stock tax question.[14] For example, the Tax Court of the United States in *Scottish American Investment Co., Ltd.*, (1949) 12 T. C. 49, 59, cited the *Chile Copper Co.* case in a situation involving precisely the same question here involved, namely, the application of the pertinent language of Section 231(b).

It is clear, therefore, that the principle of the *Chile Copper Co.* case should have been applied by the Ninth Circuit below. It remains to be seen if that was done.

The Ninth Circuit Court of Appeals followed a segregation rather than an integration approach in the case below. As a first step, the Court segregated out what it de-

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[14] As already indicated, the *Chile Copper Co.* case was decided with respect to the imposition of capital stock tax. The Citator indicates that later decisions of this and other Courts have extended the doctrine into other fields. For example, the principle of the case has been applied where the question involved the right of an individual to deduct a net operating loss incurred in a trade or business. See *Washburn v. Commissioner* (CCA 8, 1931) 51 F. (2d) 949; *Edward H. Baker* (1929) 17 B.T.A. 733. It has been applied in a case involving the question of whether a trustee in bankruptcy should file a tax return. See *In re Owl Drug Co.* (DC Nev., 1937) 21 F. Supp. 907. It was cited where the question involved recognition of separate corporate entity. See *Moline Properties, Inc. v. Commissioner* (1943) 319 U. S. 138. It applied where the question was whether taxpayer was engaged in a trade or business and therefore subject to the excess profits tax. See *Factoria Land Company*, B.T.A. Memo Op. Docket No. 2702, entered February 28, 1947. Where the question involved petitioner's right to a bad debt deduction incurred in a trade or business it was applied in *Republic Steel Corporation v. U.S.* (Ct. Cls. 1958) 159 Fed. Supp. 366. Taxpayer claimed it was a partnership and not doing business at all and Commissioner claimed the taxpayer was an unincorporated association; the *Chile Copper Co.* case controlled. See *Alexander Trust Property* (1928) 12 B.T.A. 1226. It was invoked to ascertain if an association of trustees was taxable as a corporation. See *Gonzales Creek Oil Co.* (1928) 12 B.T.A. 320. Cf. also G.C.M. 17014, *supra*.

scribed as the petitioner's "principal" or "investment activities". Then, considering these facts "taken alone", the Court concluded that this fragment of the petitioner's activities did not constitute engaging in trade or business within the meaning of Section 231. The reason given for this holding is that decisions have established that where those terms are "used elsewhere in the income tax laws they do not include such activities as those here described."[15]

It cites *Higgins v. Commissioner* (1941) 312 U. S. 212 for settled law that mere management of investments and the collection of rents, interest and dividends is insufficient to constitute the carrying on of a trade or business. Granting that the *Higgins* case has such a significance where an *individual* is concerned it is, nevertheless, true that where a corporation is concerned a somewhat different area for consideration opens up.

In a corporation case, *McCoach* v. *Minehill & Schuylkill Haven Railroad Co., supra*, this Court held that activities beyond "the mere receipt of income from property and the payment of organization and administration expenses incidental to the receipt and distribution thereof constitute such a business * * * * *"

The holding of the Court below to the effect that the 1942 amendment of Section 231(b) by Congress sought to eliminate foreign corporations "which were merely investing

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[15] This interesting language evidences that the Court below recognizes the primary effect of the phrase "engaged in a trade or business." The latter part of the quote is unsupported. In the related problem under Section 211 of the Code pertaining to resident or nonresident alien *individuals* a question has arisen as to whether or not merely trading in stocks and commodities constitutes engaging in trade or business. Cases in this area indicate that the "extensiveness" of such activity coupled with other activities can make a trade or business. See *Idaho* v. *Commissioner*, *supra* and *Comm.* v. *Nubar*, *supra*.

in the stock of domestic corporations from claiming the benefits of subdivision (b)" does not resolve the issue. The record below is replete with references to other economic activities [16] in the United States of the petitioner over and beyond mere investing activities.

Having disposed of petitioner's "investment" activities by holding that they do not constitute a trade or business, the Court below then considered some of petitioner's other activities which it refers to as "isolated and non-continuous" transactions. Having enumerated activities it regards as falling into this category, the Court then bars them from consideration in the totality of petitioner's activities.

Relying on an old regulation which excludes those places where casual or incidental transactions might be effected for purposes of determining the existence of an "office or place of business", the Court by a parity of reasoning applies the same tests in the determination of "engaged in trade or business". The language used by the Court indicates that the "casual or incidental transactions" may or may not be taken into account in the light of the corporation's whole enterprise and that this question was one of fact for the trial court.

It is submitted that this is not a fact question but rather is a legal question under the *Chile Copper Co.* principle. Moreover, casual and incidental transactions necessarily *always* must be included in viewing the "whole enterprise".

It is concluded, therefore, that the opinion of the Court below was in error and reached an erroneous result. More important here, however, is the fact that in so doing the Court proceeded in flat disregard of the principle that all corporate activities must be viewed as an integrated whole

[16] These include buying, selling, borrowing, paying, negotiating, travelling, telephoning, mailing, etc.

when determining whether a corporation was engaged in trade or business. This is the criterion established long ago by this Court for such circumstances.

B. *The holding of the Court below conflicts in principle with the holding of another Circuit Court of Appeals on a similar question.*

It has been demonstrated that the Ninth Circuit below did not apply the rule of integration enunciated in *Edwards* v. *Chile Copper Co., supra.* Argument A, above, asserts that such a failure is in itself grounds for granting *certiorari.* The argument here is that the opinion below (because of its failure to follow precedent) conflicts in principle with the opinion of the Fourth Circuit in *Helvering* v. *Scottish American Investment Co., Ltd., supra.*

The latter case involved a situation where foreign corporations had a place of business in the United States during 1936, 1937, 1938 and 1939. A United States citizen was made Assistant Secretary of the companies and given power to make collections and deposits of dividends, to draw against these accounts and pay local expenses, to keep records and make periodic reports, to make recommendations as to reorganization, to dispose of stock rights and script and to perform certain other designated duties including the preparation of United States tax returns and, generally, to take care of petitioner's affairs in the United States. The Circuit Court held that the taxpayers had maintained an "office or place of business" within the United States and were taxable as resident foreign corporations. In issue was a contention by the Commissioner that under his Regulations the activities performed in the United States were only "casual or incidental" and hence to be disregarded.

The Court held that the duties, powers and responsibilities of the United States officer of the taxpayer were far from being purely ministerial, casual or incidental. The individual was vested with real discretion and his duties were varied and important. The transactions passing through the office were many in number and involved large sums of money. This was so even though the individual had no power to make final decisions as to what securities were to be bought or sold. There was nothing artificial or sham about the office.

Most important, the Circuit Court agreed with the Tax Court that it was not proper to approach the problem by considering each activity and power separately and to analyze each apart so as to determine whether each separate activity or power considered alone could be construed as casual or incidental. The Court held that

> "the composite picture of these activities and powers must be viewed as an integrated whole and a solution must be sought accordingly. The strength of a rope is not that of a single strand or, as Mr. Justice Holmes aptly said in *Edwards* v. *Chile Copper Co.* 270 U. S. 452, 455: 'We cannot let the fagot be destroyed by taking up each item of conduct separately and breaking the stick. The activities and situation must be judged as a whole.'"

In addition to the fact that the holding of the Fourth Circuit differs markedly in principle from that enunciated by the Court below, there is the further fact that the Fourth Circuit included the casual or incidental activities along with all others in determining the composite picture. The Court below would first categorize certain activities as casual or incidental and then leave the determination of whether such transactions could change "an otherwise non-

trade or business" corporation into one within Section 231(b), to the Tax Court as a question of fact. Not only does this indicate a piecemeal approach but it errs in that the question is one of law controlled by this Court's holding in the *Edwards* v. *Chile Copper Co.* case, *supra*.

For the reasons stated it may be concluded that the holding of the Court below is in conflict in principle with the same matter of law decided by the Fourth Circuit in *Helvering* v. *Scottish American Investment Co., Ltd., supra*.

C. The Court Below has in this case decided an important question of Federal law which has not been, but should be, settled by this Court.

It has already been indicated that the precise question before the Circuit Court below has never been ruled upon by this Court. In this sense, the present case is a novel one of first impression. While somewhat related matters have reached this height, they have involved a much narrower question, namely, the existence of "an office or place of business in the United States."

The phrase here involved, "engaged in a trade or business", is a term of much wider import in tax matters. A quick examination of the Internal Revenue Codes, applicable for the taxable years as well as currently, discloses that the phrase "engaged in trade or business" or one of its recognized synonyms is used frequently. At least twenty instances can readily be found, where it is applied to corporations and many others as to individuals. It may be concluded, therefore, that the term in question is one of common usage in tax matters and, potentially at least, could involve many taxpayers.

From the foregoing it follows that whatever construction —or misconstruction—is given to the phrase in question it will have a broad impact. This would be particularly so

should the term be given a different or inconsistent interpretation in slightly different contexts.

It scarcely can be denied that in the field of capital stock tax it is necessary to view the entirety of a corporation's activities to ascertain if it is engaged in a trade or business. Can it be supposed that in the context of a foreign corporation operating in the United States, "engaged in trade or business" could apply to less than the entire bundle of activities? The very possibility suggests conflict and administrative chaos.

Finally, the fact that large numbers[17] of foreign individuals and corporations are active in the United States suggests still another reason why this matter should be put at rest.

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[17] That this is so is evidenced by the fact that during the calendar year 1958 approximately 44,500 United States Federal tax returns were filed by alien individuals or foreign corporations. Of this amount approximately 30,600 were Forms 1040B (non resident alien individual who received taxable income from sources in the United States), approximately 12,900 were Forms 1040NB (non resident alien income tax return for individuals not engaged in trade or business within the United States and having a gross income of not more than $15,400.00 from sources in the United States) and approximately 700 were Forms 1120NB (non resident foreign corporation income tax return). The Internal Revenue Service, which supplied the above figures, is not in a position to furnish the approximate number of tax returns filed by resident foreign corporations engaged in trade or business within the United States; they file Form 1120, the same form filed by United States corporations.

Conclusion

This petition for *certiorari* should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

STATUTES

INTERNAL REVENUE CODE OF 1939

SECTION 13. TAX ON CORPORATIONS IN GENERAL.

(a) DEFINITIONS.—For the purposes of this chapter——

* * * * * * * *

(2) Normal-Tax Net Income.—The term "normal tax net income" means the adjusted net income minus the credit for dividends received provided in section 26(b).

SEC. 14. TAX ON SPECIAL CLASSES OF CORPORATIONS.

* * * * * * * *

(c) FOREIGN CORPORATIONS.

(1) In the case of a foreign corporation engaged in trade or business within the United States, the tax shall be an amount equal to 24 per centum of the normal-tax net income regardless of the amount thereof.

(2) In the case of a foreign corporation not engaged in trade or business within the United States, the tax shall be as provided in section 231(a).

SEC. 15. SURTAX ON CORPORATIONS [Effective 1948 and 1949]

(a) Corporation Surtax Net Income.—For the purposes of this chapter, the term 'corporation surtax net income' means the net income minus the credit for dividends received provided in section 26(b) . . .

(b) Imposition of Tax.—There shall be levied, collected and paid for each taxable year upon the corpora-

tion surtax net income of every corporation (except . . . a corporation subject to a tax imposed by section 231(a) . . .) a surtax as follows:

(1) Surtax net incomes not over $25,000.—Upon corporation surtax net incomes not over $25,000, 6 per centum of the amount thereof.

(2) Surtax net incomes over $25,000 but not over $50,000.—Upon corporation surtax net incomes over $25,000, but not over $50,000, $1,500 plus 22 per centum of the amount of the corporation surtax net income over $25,000.

(3) Surtax net incomes over $50,000.—Upon corporation surtax net incomes over $50,000, 14 per centum of the corporation surtax net income.

"SEC. 15. SURTAX ON CORPORATIONS. [Effective 1950]

"(a) Corporation Surtax Net Income. For the purposes of this chapter —

(1) Calendar year 1950 . . .—In the case of a taxable year beginning on January 1, 1950, and ending on December 3, 1950, . . . the term 'corporation surtax net income' means the net income minus the sum of the following credits:

(A) The credit for dividends received provided in section 26(b);

. . . . . .

"(b) IMPOSITION OF TAX.—

. . . . . .

(2) Calendar year 1950.—In the case of a taxable year beginning on January 1, 1950, and ending on December 31, 1950, there shall be levied, collected, and paid for such taxable year upon the corporation surtax net income of every corporation (except a corporation subject to a tax imposed by section 231(a) . . .) a surtax determined by computing a tentative surtax of 19

per centum of the amount of the corporation surtax net income in excess of $25,000, and by reducing such tentative surtax by an amount equal to 1 per centum of the lower of (A) the amount of the credit provided in section 26(a), or (B) the amount by which the corporation surtax net income exceeds $25,000.

. . . . . .

"SEC. 26. CREDITS OF CORPORATIONS.

"In the case of a corporation the following credits shall be allowed to the extent provided in the various sections imposing tax——

. . . . . .

(b) DIVIDENDS RECEIVED.—An amount equal to the sum of——

(1) In general.—85 per centum of the amount received as dividends . . . . . from a domestic corporation which is subject to taxation under this chapter; . . . . . "

SEC. 231. TAX ON FOREIGN CORPORATIONS

(a) NONRESIDENT CORPORATIONS

(1) IMPOSITION OF TAX.—There shall be levied, collected, and paid for each taxable year, in lieu of the tax imposed by sections 13 and 14, upon the amount received by every foreign corporation not engaged in trade or business within the United States, from sources within the United States, as interest (except interest on deposits with persons carrying on the banking business), dividends, rents, salaries, wage, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable annual or periodical gains, profits, and income, a tax of 30 per centum of such amount, except that in the case of corporations organized under the laws of any country in North, Central, or South America, or in the West Indies, or of Newfoundland such rate with respect to

dividends shall be reduced to such rate (not less than 5 per centum) as may be provided by treaty with such country.

* * * * * * *

(b) RESIDENT CORPORATIONS.—A foreign corporation engaged in trade or business within the United States shall be taxable as provided in section 14(c)(1) and section 15.

APPENDIX B

THE TAX COURT OF THE UNITED STATES

T.C. Memo 1957-164

CONTINENTAL TRADING INC., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 55212

Filed August 30, 1957.

M. W. Dobrzensky, Esq., and S. H. Dobrzensky, Esq., for the petitioner.

Aaron S. Resnik, Esq., for the respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

OPPER, Judge:

Respondent determined the following deficiencies in income tax:

Year	Deficiency
1948	$208,300.59
1949	151,559.71
1950	114,468.53

The principal issue is whether petitioner qualified as a resident foreign corporation during the years involved by engaging in trade or business within the United States. If petitioner prevails on that issue, a subordinate issue to be considered is whether respondent erred in disallowing deductions for interest, expenses, and loss on sale of property as not connected with income from sources within the United States.

Findings of Fact

Certain facts are stipulated and are hereby found.

Petitioner, a Panamanian corporation organized in May 1947, maintained its principal office in Mexico City, Mexico. It filed its Federal income tax return for 1948 with the collector of internal revenue for the first district of California, and its 1949 and 1950 returns with the collector of internal revenue for the district of Nevada. Those returns stated that petitioner was a resident foreign corporation with "Investment" as its principal activity.

Petitioner qualified as a foreign corporation in Nevada in March 1948 and continued to be so qualified until March 1951. It used for its American address that of a Reno, Nevada, company that acted as resident agent for petitioner and other foreign corporations. Petitioner represented that it maintained only one place of business in the United States.

Grover Turnbow, a United States citizen with offices in Oakland, California, served as petitioner's president. After March 1948, at the suggestion of the California attorney who served as petitioner's vice president, Turnbow had petitioner's name added to the business names already appearing on his Oakland office door and on the building directory, which were: International Dairy Association, Inc., International Dairy Engineering Co., and International Dairy Supply Company, hereafter referred to as Association, Engineering, and Supply, respectively. Turnbow was president and sole stockholder of Supply. Petitioner never used the Oakland address on its letterheads or otherwise and paid no rent for the Oakland office.

Petitioner represented the incorporation of part of the vast holdings of Axel Wenner-Gren, an internationally famous financier whose wealth was over $1,000,000,000. Wenner-Gren held substantial amounts of stock in the Electrolux and Servel corporations, as well as sizable and diverse holdings in Mexican and other foreign enterprises. Prior to petitioner's incorporation, Turnbow served as attorney in fact in the United States for Wenner-Gren.

who was then borrowing large sums from American lending institutions for use outside the United States.

Turnbow became acquainted with Wenner-Gren in Mexico when he erected a recombined milk plant in which Wenner-Gren had a financial interest. Turnbow unsuccessfully sought to interest Wenner-Gren in financing the supplying of milk by Supply to the armed forces in the Far East.

Turnbow and his various enterprises were interested in erecting recombined milk plants in foreign countries. Prior to and during the years here involved, the program failed to materialize because of the inability to reconvert foreign currency into American dollars, and the instability of foreign currencies.

Turnbow hoped that petitioner would assist in the financing of these plants if his program for the establishment of recombined milk plants in foreign countries proved feasible. Its function would be to secure funds, but without any voice or activity in the operations of the plants. Petitioner never undertook any activity in connection with the establishment of such recombined milk plants and never used its assets and borrowings for this or any related purpose. After petitioner's incorporation, it assumed Wenner-Gren's liabilities to various banks, having acquired his stock in the Electrolux and Servel corporations, which it thereupon pledged as security for loans. As of the beginning of 1948, petitioner had assumed indebtedness of Wenner-Gren as follows:

Bank of America, N.T. & S.A.	$1,000,000
Central Hanover Bank and Trust Company, New York	480,000
Telerie, Inc.	926,000

Petitioner liquidated the loan from Central Hanover Bank during 1948. The loan from Telerie, Inc. remained outstanding as of the end of 1950. It liquidated the loan from Bank of America in August 1948.

From 1948 through 1950, petitioner had no paid employees in the United States. Turnbow received $1,500 per month during the last 6 months of 1950 denominated as salary for his services to petitioner. This represented part

of an over-all settlement effectuated in June 1950 between Turnbow and Wenner-Gren, as individuals, whereby Turnbow would receive from Wenner-Gren stock and cash totaling $105,000. The settlement covered, among other items, Turnbow's services to Wenner-Gren from October 1946 through June 1950.

Petitioner maintained no books of account in the United States. Its only records consisted to bank statements, check books, and documents pertaining fo transactions within the United States, all in the care of Turnbow's secretary at Oakland. Petitioner maintained bank accounts in the United States at the First National Bank, Reno, Nevada, and at the Bank of America, N.T. & S.A. in San Francisco.

Petitioner's only assets in the United States at the end of 1948 consisted of Electrolux and Servel stock and the two bank account balances.

Petitioner reported on its tax returns for the years in question that it derived more than 50 per cent of its gross income from sources outside the United States. It reported gross income from sources within the United States, as follows:

1948	$817,791.39
1949	605,635.10
1950	446,863.19

Of the 1948 gross income, $823,635.50 represented dividends on Electrolux and Servel stock. The difference was represented by a reported net loss of $5,844.11 resulting from sales of property other than capital assets. Of the 1949 gross income, $602,125.20 represented dividends, and $3,509.90 "Other Income in the United States." Of the 1950 gross income, $441,624 represented dividends from the Electrolux Corporation, and $5,239.19 additional income "From Sales."

During 1948, petitioner's activities in the United States included the following: (a) It collected dividends on Electrolux and Servel stock. (b) It made payments of principal and interest on outstanding loans. (c) In May it borrowed $1,000,000 from the Bank of America, which Wenner-Gren used in acquisition of Mexican telephone companies. (d) On

August 6, it borrowed $1,850,000 from the Bank of America, of which it used $1,100,000 to repay prior indebtedness of Wenner-Gren to the bank, which petitioner had assumed. On that same date petitioner drew checks in excess of the balance of $750,000 to make payments of principal and interest on other outstanding indebtedness.

During 1949, petitioner's activities in the United States included the following: (a) It collected dividends on Electrolux and Servel stock. (b) It made payments on principal and interest on outstanding loans. (c) It secured and repaid short-term advances from Turnbow. (d) In September it borrowed $1,700,000 from the Bank of America, used to liquidate the outstanding balances of two loans from that bank. (e) In December it sold its 55,000 shares of Servel stock theretofore pledged with the Bank of America to secure loans. It used the proceeds of the sale to pay outstanding obligations to the bank.

During 1950, petitioner's activities in the United States included the following: (a) It collected dividends on Electrolux stock. (b) It made payments on principal and interest on outstanding loans. (c) On January 3, it borrowed $2,000,000 from the Central Hanover Bank. It used the bulk of this loan to repay the $1,700,000 loan from the Bank of America. It transferred approximately $400,000 to its account in Mexico City, $110,000 for the account of a Swedish bank, and approximately $275,000 to its account at the Bank of America, much of which was thereafter transferred to petitioner's Mexican accounts. (d) Petitioner repaid the $2,000,000 loan. In its negotiations with the Central Hanover Bank, petitioner represented itself as a Panamanian corporation, doing business in foreign countries.

The funds borrowed by petitioner were in the main used by Wenner-Gren. Turnbow had no direct knowledge of their use.

In July 1948, petitioner engaged in a transaction of a type in which it was not previously nor subsequently engaged. It purchased a carload of dry milk fat from Kraft Foods Company for $46,212.75. Through Association, a company in which Turnbow was interested, it resold the

fat 1 month later to Kraft for $40,248. Association requested that Kraft make the check payable to petitioner. Petitioner reported the loss in its 1948 tax return.

As an accommodation to a Mexican corporation petitioner purchased, in 1950, equipment for that corporation for which it was reimbursed without profit.

In each year, the only other activity reported by petitioner was represented by nominal amounts of income resulting from transactions relating to cans used by Supply. In 1948, such reported income amounted to $120.64; in 1949, $3,509.90; in 1950, $5,239.19.

In connection with its contract for supplying recombined milk products to troops in the Far East, Supply found it necessary, commencing in 1948, to obtain tin cans. The contract set forth specifications for the necessary cans to be bought in the United States. In 1948, Supply procured the cans from Western Can Company, hereafter referred to as Western. An employee in Supply's procurement department ordered by telephone the necessary number of cans and followed up with a written purchase order. Supply received shipments for which it paid by check.

In December 1948, petitioner undertook to place with Western, in its own name, an order covering precisely the same type of cans and bearing the same markings as Supply had theretofore ordered in its own name from Western. Western billed petitioner at the same price which Supply had paid Western on an earlier order. That order, in petitioner's name, was first telephoned to Western by either Supply's procurement department or Turnbow's secretary on December 8, 1948. The Western salesman who received the order filled out an order form in the name of Supply, but petitioner's name was added later.

On the day that the order was telephoned to Western, Supply prepared an export purchase order for the cans addressed to petitioner. Supply had used the same form in preparing its orders theretofore forwarded directly to Western. Petitioner then forwarded to Western a written confirmatory order in its name. Petitioner's check dated December 16, 1948 extinguished the obligation to Western for the cans. Supply paid an invoice on petitioner's letter

head for the cans at a 5 per cent increase in price within 10 days of the invoice date.

In 1949, petitioner utilized the same recording and routing of orders for cans needed by Supply on 37 occasions. Petitioner derived the proceeds reported as income on its 1949 returns because it billed Supply at 5 per cent more than it was billed by Western. In 1950, petitioner utilized the same recording and routing on approximately 48 occasions and derived the reported profit from sales transactions from this operation.

There was no business purpose connected with the can transactions engaged in by petitioner. It never used its Nevada office in these operations. It carried no inventory of cans and ordered no cans other than those used by Supply. In every instance in which Supply acquired cans in this way, it paid petitioner within 10 days of petitioner's payment to Western.

After 1950, Supply recommenced ordering and purchasing of cans directly from Western.

During 1948, 1949 and 1950, petitioner was not engaged in trade or business within the United States.

Opinion

Business has been defined as "[t]hat which occupies the time, attention, and labor of men for the purpose of a livelihood or profit." *Flint* v. *Stone Tracy Co.*, 220 U.S. 107, 171. "The word, notwithstanding disguise in spelling and pronunciation, means 'busyness'; it implies that one is kept more or less busy, that the activity is an occupation." *Snell* v. *Commissioner*, (C.A. 5) 97 F. 2d 891, 892, affirming B.T.A. Memorandum Opinion. "* * * it is essential that livelihood or profit be at least one of the purposes for which the employment is pursued, in order to bring it within the accepted definition of the word * * *." *Deering* v. *Blair*, (C.A., D.C.) 23 F 2d 975, 976, affirming 5 B.T.A. 1055. Transactions which are not entered into for profit and which do not and in all probability cannot result in a profit, particularly where such transactions are of an isolated and nonconfinuous nature, will not dictate the conclusion that one is engaged in business. And that, notwithstanding pe-

titioner's categorical statement to the contrary in its brief, we view as the only issue.

Petitioner claims the tax status of a resident foreign corporation in order to receive certain tax benefits. For this it must have been "engaged in business" in the United States.[1] The desired deductions and credits Congress could extend or withhold. *New Colonial Co.* v. *Helvering*, 292 U.S. 435. Our problem is to determine congressional intent with respect to the relevant statutory provision as applied to the demonstated facts.

As to the legislative frame of mind there seems little room for doubt. The enactment of the 1942 amendment was accompanied by an unequivocal statement that a foreign corporation merely servicing its investments in this country was not the type of taxpayer to which the section was intended to refer.[2]

The detailed analysis submitted by petitioner of all of its transactions during the years in controversy shows that only items accounting for a fraction of 1 per cent of petitioner's total income represent those which by any stretch of the imagination could be considered business. *See Linen Thread Co., Ltd.*, 14 T.C. 725. Such transactions resulted in no substantial gain, and considering the time spent on them they could not, and in several instances actually did not, result in even a nominal net profit.[3] In this case we

[1] Internal Revenue Code of 1939.

"SEC. 231. TAX ON FOREIGN CORPORATIONS.

"(b) Resident Corporations. A foreign corporation engaged in trade or business within the United States shall be taxable as provided in section 13 and section 15."

[2] "A tendency has arisen, principally on the part of foreign corporations which are substantial holders of the stock of domestic corporations * * * to attempt to establish that they have an 'office or place of business' within the United States and hence secure the very different tax treatment accorded taxpayers * * * Since such corporations * * * engage in no other economic activities in the United States, they can not be said to be engaged in trade or business within the United States." H. Rept. No. 2333, 77th Cong., 1st Sess., 1942-2 C.B. 372, 449.

[3] Petitioner's so-called "right" to conduct itself as it chooses is not now in controversy. The question is what are the effects of such conduct upon petitioner's tax liability.

think their character was such that they cannot be regarded as business transactions within the quoted definition because of their obvious lack of business purpose. *Thacher* v. *Lowe*, (S.D., N.Y.) 288 F. 994; *Deering* v. *Blair*, *supra*.

Petitioner relies on several cases for the proposition that the question is not what was petitioner's business, but whether what it did was in fact what it appeared to be in form. E.g., *W. P. Hobby*, 2 T.C. 980; *Clara M. Tully Trust*, 1 T.C. 611; *John Junker Spencer*, 19 T.C. 727. But these are authorities in an area which we regard as foreign to the present issue. There the question of purpose was significant in order to determine whether or not to give effect to the transactions in question, not in order to determine whether petitioner was, in fact, *Jan Casimir Leyenhaupt*, 20 T.C. 151, affirmed per curiam (C.A. 9) 221 F.2d 227, "engaged in business." See *Marian Bourne Elbert*, 45 B.T.A. 685.

There are at least two factual reasons for answering that question here in the negative. The first is the element of purpose, in view of the difficulty of assuming that one would be engaged in business who had no "business purpose" but whose conduct as apparently admitted by petitioner, was dictated not by a business objective but purely by a desire to save taxes. *Gregory* v. *Helvering*, 293 U.S. 465; *Linen Thread Co., Ltd., supra*. In this view we may regard the transactions as "substantive" in the sense that the operations described were actually performed, just as they were so regarded in the *Gregory* case, without concluding that they constituted the conduct of a business, that they rendered the petitioner "busy," or that they were engaged in for a livelihood or profit.

Second, for a taxpayer to be engaged in business, there must be a fair degree of activity, scope and continuity in the transactions undertaken. See *Ehrman* v. *Commissioner* (C.A. 9) 120 F.2d 607, affirming 41 B.T.A. 652, certiorari denied 314 U.S. 668; *Snell* v. *Commissioner*, *supra*. The record as a whole and petitioner's summary of the transactions to which we have already referred demonstrate conclusively that there was neither consistency nor frequency in those few isolated activities which could, within the

express legislative intent, otherwise have been the kind of business in which Congress expected a foreign corporation to engage for purposes of the present issue. And it is not without significance that petitioner itself on its tax return described its activity as "Investment."

Upon all the evidence, we conclude not only that petitioner has failed to carry its burden of showing that it was engaged in business in the United States, but that, in fact, the record affirmatively shows the opposite to be true.

Decision will be entered for the respondent.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 15,912

March 10, 1959

CONTINENTAL TRADING, INC., PETITIONER,

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

On Petition to Review a Decision of the Tax Court of the United States

Before POPE, DENMAN and OBER, Circuit Judges.

POPE, Circuit Judge.

Petitioner is a Panamanian corporation. It was organized in May, 1947, and maintained its principal office in Mexico City. For the year 1948 it filed an income tax return in California, and for the years 1949 and 1950 it filed such returns in Nevada.

The Commissioner determined deficiencies in the income tax of petitioner for each of those three years. The returns had been filed upon the assumption and with the claim that petitioner was a resident foreign corporation engaged in trade or business in the United States. The Commissioner determined, however, that it was a foreign corporation not engaged in trade or business within the United States and hence subject to a higher income tax liability.[1]

The taxpayer filed its petition in the Tax Court for redetermination of the deficiencies so asserted by the Commissioner. It presented to that court the sole question as to whether petitioner was a resident foreign corporation en-

[1] If petitioner qualified under § 231(b) it would be entitled to substantial dividends received credits.

gaged in trade or business in the United States during those taxable years.

The controlling statutory provisions are to be found in § 231 of the Internal Revenue Code of 1939, as amended by the Revenue Act of 1942, 56 Stat. 798.[2]

The facts relating to the question whether petitioner was or was not engaged in trade or business within the United States during the years in question are set out in the findings of the Tax Court. These described first what may be called the principal activities of the corporation during those years, and later, certain so-called casual or incidental transactions which the corporation carried on. The principal activities are described as follows:

"Petitioner qualified as a foreign corporation in Nevada in March, 1948, and continued to be so qualified until March, 1951. It used for its American address that of Reno, Nevada, company that acted as resident agent for petitioner and other foreign corporations. Petitioner represented that it maintained only one place of business in the United States.

"Grover Turnbow, a United States citizen with offices in Oakland, California, served as petitioner's president. After March, 1948, at the suggestion of the California attorney who served as petitioner's vice president, Turnbow had petitioner's name added to the business names already appearing on his Oakland office door and on the building directory, which were: International Dairy Association, Inc., International Dairy Engineering Co., and International Dairy Supply Company, hereafter referred to as Association, Engineering, and Supply, respectively. Turnbow was president and sole stockholder of Supply. Petitioner never used the Oakland address on its letterheads or otherwise and paid no rent for the Oakland office.

"Petitioner represented the incorporation of part of the

[2] § 231 in subdivision (a) relating to "non-resident corporations" provided for tax upon "very foreign corporation not engaged in trade or business within the United States", while subdivision (b) provided, "(b) Resident Corporations. A Foreign corporation engaged in trade or business within the United States shall be taxable as provided in section 14(c)(1) and section 15."

vast holdings of Axel Wenner-Gren, an internationally famous financier whose wealth was over $1,000,000,000. Wenner-Gren held substantial amounts of stock in the Electrolux and Servel corporations, as well as sizable and diverse holdings in Mexican and other foreign enterprises. Prior to petitioner's incorporation, Turnbow served as attorney in fact in the United States for Wenner-Gren, who was then borrowing large sums from American lending institutions for use outside the United States.

"Turnbow became acquainted with Wenner-Gren in Mexico when he erected a recombined milk plant in which Wenner-Gren had a financial interest. Turnbow unsuccessfully sought to interest Wenner-Gren in financing the supplying of milk by Supply to the armed forces in the Far East.

"Turnbow and his various enterprises were interested in erecting recombined milk plants in foreign countries. Prior to and during the years here involved, the program failed to materialize because of the inability to reconvert foreign currency into American dollars, and the instability of foreign currencies.

"Turnbow hoped that petitioner would assist in the financing of these plants if his program for the establishment of recombined milk plants in foreign countries proved feasible. Its function would be to secure funds, but without any voice or activity in the operations of the plants. Petitioner never undertook any activity in connection with the establishment of such recombined milk plants and never used its assets and borrowings for this or any related purpose.

"After petitioner's incorporation, it assumed Wenner-Gren's liabilities to various banks, having acquired his stock in the Electrolux and Servel corporations, which it thereupon pledged as security for loans. As of the beginning of 1948, petitioner had assumed indebtedness of Wenner-Gren as follows:

"Bank of America, N. T. & S. A., $1,100,000;

"Central Hanover Bank and Trust Company, New York, $480,000;

"Teleric, Inc., $926,000.

"Petitioner liquidated the loan from Central Hanover Bank during 1948. The loan from Telerie, Inc. remained outstanding as of the end of 1950. It liquidated the loan from the Bank of America in August 1948.

"From 1948 through 1950, petitioner had no paid employees in the United States. Turnbow received $1,500 per month during the last 6 months of 1950 denominated as salary for his services to petitioner. This represented part of an over-all settlement effectuated in June 1950 between Turnbow and Wenner-Gren, as individuals, whereby Turnbow would receive from Wenner-Gren stock and cash totaling $105,000. The settlement covered, among other items, Turnbow's services to Wenner-Gren from October 1946 through June 1950.

"Petitioner maintained no books of account in the United States. Its only records consisted of bank statements, check books, and documents pertaining to transactions within the United States, all in the care of Turnbow's secretary at Oakland. Petitioner maintained bank accounts in the United States at the First National Bank, Reno, Nevada, and at the Bank of America, N. T. & S. A. in San Francisco.

"Petitioner's only assets in the United States at the end of 1948 consisted of Electrolux and Servel stock and the two bank account balances.

"Petitioner's only assets in the United States at the end of 1948 consisted of Electrolux and Servel stock and the two bank account balances.

"Petitioner reported on its tax returns for the years in question that it derived more than 50 per cent of its gross income from sources outside the United States. It reported gross income from sources within the United States, as follows:

1948	$817,791.39
1949	605,635.10
1950	446,863.19

Of the 1948 gross income, $823,635.50 represented dividends on Electrolux and Servel stock. The difference was rep-

resented by a reported net loss of $5,844.11 resulting from sales of property other than capital assets. Of the 1949 gross income, $602,125.20 represented dividends, and $3,509.90 'Other Income in the United States.' Of the 1950 gross income, $441,624 represented dividends from the Electrolux Corporation, and $5,239.19 additional income 'From Sales'.

"During 1948, petitioner's activities in the United States included the following: (a) It collected dividends on Electrolux and Servel stock. (b) It made payments of principal and interest on outstanding loans. (c) In May it borrowed $1,000,000 from the Bank of America, which Wenner-Gren used in acquisition of Mexican telephone companies. (d) On August 6, it borrowed $1,850,000 from the Bank of America, of which it used $1,100,000 to repay prior indebtedness of Wenner-Gren to the bank, which petitioner had assumed. On that same date petitioner drew checks in excess of the balance of $750,000 to make payments of principal and interest on other outstanding indebtedness.

"During 1949, petitioner's activities in the United States included the following: (a) It collected dividends on Electrolux and Servel stock. (b) It made payments on principal and interest on outstanding loans. (c) It secured and repaid short-term advances from Turnbow. (d) In September it borrowed $1,700,000 from the Bank of America, used to liquidate the outstanding balances of two loans from that bank. (e) In December it sold its 55,000 shares of Servel stock, theretofore pledged with the Bank of America to secure loans. It used the proceeds of the sale to pay outstanding obligations to the bank.

"During 1950, petitioner's activities in the United States included the following: (a) It collected dividends on Electrolux stock. (b) It made payments on principal and interest on outstanding loans. (c) On January 3, it borrowed $2,000,000 from the Central Hanover Bank. It used the bulk of this loan to repay the $1,700,000 loan from the Bank of America. It transferred approximately $400,000 to its account in Mexico City, $110,000 for the account of a Swedish bank, and approximately $275,000 to its account

at the Bank of America, much of which was thereafter transferred to petitioner's Mexican accounts. (d) Petitioner repaid the $2,000,000 loan. In its negotiations with the Central Hanover Bank, petitioner represented itself as a Panamanian corporation, doing business in foreign countries.

"The funds borrowed by petitioner were in the main used by Wenner-Gren. Turnbow had no direct knowledge of their use."

It will be noted that the activities described in the last four quoted paragraphs all relate to the corporation's investment in the stock of other corporations, the collection of dividends and the borrowing of money, some of which was used to acquire Mexican companies and some of which was used by Wenner-Gren. The taxpayer's filed returns stated that its principal activity was "Investment", and such a term would appear to describe the activities just listed.

On the basis of these facts, taken alone, there cannot be any question but that the petitioner corporation was not "engaged in trade or business" within the meaning of 231. While the Internal Revenue Code did not specifically define "trade or business", yet the decisions have definitely established that where those terms are used elsewhere in the income tax laws, they do not include such activities as those here described.

The leading case on this point arose out of a taxpayer's effort to deduct the expenses of managing his investments in stocks and bonds as expenses incurred "in carrying on any trade or business" under the provisions of § 23(a) of the Revenue Act of 1932. The Board of Tax Appeals upheld the Commissioner's refusal to permit the deduction. Said the Supreme Court: "The petitioner merely kept records and collected interest and dividends from his securities, through managerial attention for his investments. No matter how large the estate or how continuous or extended the work required may be, such facts are not sufficient as a matter of law to permit the courts to reverse the decision of the Board." *Higgins v. Commissioner*, 312 U. S. 212.

218.[3] Since that decision it is fair to say that it is settled law that the mere management of investments and the collection of rents, interest, and dividends is insufficient to constitute the carrying on of a trade or business. See "Trade or Business Under Income Tax Laws," 3 Kan. L. R. 99, 114.

The meaning of the decision in the *Higgins* case was stated in *Commissioner* v. *Smith*, 2 cir., 203 Fed. (2d) 310, 312, as follows: "The full-time management of one's investments does not constitute a trade or business."[4] This limited meaning of the phrase "trade or business" was plainly in the mind of Congress when the language of § 231 was last amended prior to the years here in question. That amendment occurred in 1942. Prior to that time subdivision (b) provided the more advantageous rate of tax not merely for those foreign corporations "engaged in trade or business" within the United States, but also for those "having an office or place of business" within the United States. The 1942 amendment eliminated this provision relating to an office or place of business. The House report which accompanied the bill accomplishing that made it plain that the intended effect was to eliminate foreign corporations which were merely investing in the stock of

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[3] The decision in the *Higgins* case led to corrective legislation, and this was accomplished, not by redefining the terms "trade or business", but by adding subdivision 23(a)(2) permitting deductions of expenses incurred "for the production or collection of income, or for the management, conservation, or maintenance of property held for the production of income."

[4] That was a case in which taxpayer sought to deduct as a loss for the taxable year a debt which became worthless during the year, claiming it to be a business debt under § 23(k)(1) of Internal Revenue Code, 1939. Taxpayer had made extensive loans to and investments in numerous business enterprises. The court reversed a Tax court decision for the taxpayer. Noting the history of the use, in the Code, of the term "trade or business", the court commented on its "restricted meaning" and said: "Although Congress has never defined the term 'trade or business', it is clear that this concept as used in § 23(k) does not encompass all activities engaged in for profit."

domestic corporations from claiming the benefits of subdivision (b).[5]

There can be no doubt that, for the purposes of § 231, "trade or business" did not include the activities of petitioner which are described in the above quoted findings of the Tax Court.

This brings us to a consideration of some other activities of petitioner,—activities referred to by the Tax Court as "isolated and noncontinuous" transactions. These were of three kinds: (1) in July, 1948, petitioner purchased a carload of dry milk fat from Kraft Foods Company for $46,212.75 and sold it one month later through one of Turnbow's companies for $40,248.[6] (2) As an accommodation to a Mexican corporation petitioner purchased, in 1950, equipment for that corporation for which it was reimbursed without profit. (3) In all three years petitioner bought tin cans

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[5] The report stated: "Under existing law, nonresident aliens and foreign corporations are divided into two classes: (a) Those not engaged in trade or business within the United States and not having an office or place of business therein and (b) those engaged in trade or business within the United States or having an office or place of business therein. Those in class (a) are taxed at a flat rate on fixed and determinable income while those in class (b) are subject to tax at the corporate rate applicable to domestic corporations.

"A tendency has arisen, principally on the part of foreign corporations which are substantial holders of the stock of domestic corporations and, occasionally on the part of nonresident alien individuals, to attempt to establish that they have an 'office or place of business' within the United States and hence secure the very different tax treatment accorded taxpayers within class (b). Since such corporations and individuals engage in no other economic activities in the United States, they can not be said to be engaged in trade or business within the United States.

"It appears to your committee to be in the interests of good administration to establish but one test (as is done with respect to capital stock tax in section 1200) in ascertaining the classification of foreign entities, namely, whether or not it is engaged in trade or business within the United States. Such amendment narrows sharply the field of uncertainty arising in such cases and removes a possible avenue of tax avoidance to large foreign corporate and other holders of domestic securities." 1942-2 C. B. 372, 449.

[6] Speaking of this the Tax Court said: "In July 1948, petitioner engaged in a transaction of a type in which it was not previously nor subsequently engaged."

for milk products which were needed by Supply, one of Turnbow's companies. The Tax Court summarized these can transactions as follows: "In each year, the only other activity reported by petitioner was represented by nominal amounts of income resulting from transactions relating to cans used by Supply. In 1948, such reported income amounted to $120.64; in 1949, $3,509.80; in 1950, $5,239.19." The first such can purchase occurred in December, 1948. Turnbow or Supply put in the order, but in petitioner's name. It paid for the cans and turned the cans to Supply for a five per cent increase over the price it paid. This December 1948 transaction was repeated 37 times in 1949 and on 48 occasions in 1950. Said the Tax Court: "There was no business purpose connected with the can transactions engaged in by petitioner. It never used its Nevada office in these operations. It carried no inventory of cans and ordered no cans other than used by Supply. In every instance in which Supply acquired cans in this way, it paid petitioner within 10 days of petitioner's payment to Western. After 1950, Supply recommended ordering and purchasing of cans directly from Western."

We think it was within the competence of the Tax Court to find that these facts were insufficient to show that petitioner was engaged in trade or business within the United States. The court found these milk fat, equipment, and milk can transactions, because they were "of an isolated and noncontinuous nature," and because they were "dictated not by a business objective but purely by a desire to save taxes,"[7] did not amount to activities sufficient to bring petitioner within the definition of § 231(b). Wholly apart from any question of "business purpose," it seems plain that whether these milk fat, milk can transactions were properly to be regarded, in the light of the corporation's whole enterprise, as casual or incidental transactions, was a question of fact. And further, whether as such, those transactions served to change an otherwise "non-trade or business" corporation into one within § 231(b) is also a question of fact.

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[7] On this point the court cited *Gregory* v. *Helvering*, 293 U. S. 465.

In *Linen Thread Co. v. Commissioner*, 2 cir., 128 Fed. (2d) 166 the court was considering the validity of a Regulation defining the term "office or place of business" as used in § 231(b) before its amendment. It then provided: "A foreign corporation engaged in trade or business within the United States or having an office or place of business therein shall be taxable as provided in section 14(c)(1)." The Regulation recited: "The term 'office or place of business,' however, implies a place for the regular transaction of business and does not include a place where casual or incidental transactions might be, or are, effected." The court said: "The regulations are valid because reasonable and *within the fair meaning of the statute.*" (See, accord, *Linen Thread Co. v. Commissioner*, 2 cir., 152 Fed. (2d) 625.

For a like reason we think the Tax Court's holding that casual or incidental transactions (such as these milk fat and milk can matters) are not sufficient to show the corporation to be "engaged in trade or business," was within the fair meaning of the statute.

The Tax Court's decision was filed on September 4, 1957. On October 21, 1957 petitioner retained new counsel. He studied the record and reached the conclusion that "not all of the available facts were presented with reference to the issue decided by the Court," and so, although the 30 days allowed by the Tax Court's rules for making such a motion had long since passed, counsel moved for leave to file a motion to vacate the decision and reopen the proceedings for further testimony.[8] It is claimed the court erred in denying the motion.

[8] The proposed motion was stated to be on the following grounds: "In support of these motions, it is averred that:

"1. The Memorandum Findings of Fact and Opinion of this Court in the above-entitled proceedings was filed on August 30, 1957.

"2. The decision in this proceeding was filed on September 4, 1957.

"3. The undersigned was retained as counsel by the petitioner on October 21, 1957, to prosecute an appeal from the decision of this Court to the United States Court of Appeals for the Ninth Circuit.

"4. Such an appeal would have to be filed not later than December 4, 1957.

"5. In the process of reviewing the files relating to this proceeding with reference to filing the appeal above-mentioned, the conclusion has

The argument is groundless. Granting such a motion would at best be purely discretionary, none of the matters new counsel thought should have been presented were newly discovered, or unknown to petitioner or its representatives at the time of the hearing. Finally, there was no showing what this additional evidence would be, if taken, nor whether it would alter the picture of petitioner's activities.

Affirmed.

(Judge Denman did not participate in this opinion.)

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been reached that not all of the available facts were presented with reference to the issue decided by the Court. In addition, the testimony of Axel L. Wenner-Gren, the principal party at interest, was neither sought nor presented to the Court. Wenner-Gren is and was available to testify and could testify of his own knowledge to certain relevant facts in connection with the issue in the proceeding.

"It further appears to the undersigned that in some instances the facts presented were not presented in the most favorable light. In this connection see the affidavit of Birger Strid, attached.

"It is believed that a more complete, accurate and informative presentation of relevant facts could be made if these motions were granted and the decision vacated and the proceeding set for the taking of further testimony."

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 15,912

CONTINENTAL TRADING, INC., PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

JUDGMENT

On Petition to Review a Decision of the Tax Court of the United States.

This cause came on to be heard on the Transcript of the Record from the Tax Court of the United States and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Decision of the said Tax Court of the United States in this cause be, and hereby is affirmed.

(ENDORSED). Judgment

Filed and entered: March 10, 1959.

PAUL P. O'BRIEN,
Clerk.